



Procedures on Guidance

Requirements & Best Practices for Use of Guidance Documents



Office of Regulatory Management
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This document provides information for Virginia agencies on when and how to use guidance documents and on possible alternatives to the use of guidance documents.

What are the possible uses of guidance documents?

Agencies issue *guidance documents* to provide information on how to interpret or implement statutes or regulations. Possible uses for guidance documents include:

- Summarizing statutory or regulatory requirements
- Elaborating on how to achieve compliance with regulatory requirements
- Highlighting useful resources for regulated parties
- Directing agency employees on how to administer a regulatory program

Guidance documents remain in full force until agencies rescind them. In that light, if an agency wishes to communicate information on a one-time basis (e.g., “the deadline for applying is July 31, 2023”), it is more appropriate to do so by issuing a general notice than by adopting a new guidance document. It is also important not to use a general notice when a guidance document is more appropriate.

Can an agency set requirements via guidance documents?

No. Only statutes and regulations have the force of law. (Virginia Code § 2.2-4101) Guidance documents cannot be enforced by the agency.

Agencies should also avoid setting requirements via guidance document for reasons of transparency. The Administrative Process Act (APA) includes various procedures that create an open and accountable process for the development of regulations. It is important that any document imposing a requirement go through this process. In addition, the Virginia Administrative Code (VAC) compiles all regulations in a single place. It is far easier for the public to find regulatory requirements in the VAC than to sort through an agency's guidance documents on its website or on Town Hall.

In no instance should an agency set or modify a *fee* (e.g., licensing fee, exam fee) via a guidance document *rather* than a regulation. An agency may, however, disclose a schedule or list of potential *penalties or fines* (including ranges) in order to provide transparency in an enforcement program. This is a permissible use of a guidance document, since the agency is simply announcing in advance how it will use its discretion rather than setting a new requirement. Such announcements should always occur via either regulation or guidance document, however, and should not be announced via a communication that does not undergo Office of Regulatory Management (ORM) review or receive public comment.

How should an agency proceed if it needs to act quickly?

As noted above, it is perfectly acceptable for an agency to *describe* a statutory or regulatory requirement via a guidance document or general notice. In that light, if an agency needs to quickly communicate a change in law, such as a new requirement imposed by the General Assembly, it is perfectly permissible to use a guidance document or general notice for that purpose.

If an agency needs to create *new requirements* that go beyond what is contained in statutes or regulations, however, it should not use a guidance document. If it needs to act quickly, it should instead consider the following options for promulgating regulations in short order:

Type of Regulatory Action	Legal Authority	Key Characteristics of the Regulatory Process
Emergency	APA § 2.2-4011 <ul style="list-style-type: none">Office of Attorney General (OAG) and Governor's Office must approve existence of emergency (unless	<ul style="list-style-type: none">Includes only one step rather than three (NOIRA, proposed, final)Effective immediately upon submission to RegistrarReview by Department of Planning and Budget (DPB) is limited to 21 days

	statute mandates promulgation of regulation in 280 or fewer days)	<ul style="list-style-type: none"> Effective only for 18 months (renewable for 6 months), but this allows time to adopt a permanent regulation
Exempt	APA §§ 2.2-4002, 4006 <ul style="list-style-type: none"> Any non-discretionary regulation mandated by federal or state statute, federal regulation, or court order qualifies as exempt (§2.2-4006(A)(4)) Agencies often have other exemptions they can invoke	<ul style="list-style-type: none"> Includes only one step rather than three (NOIRA, proposed, final) Only reviewed by OAG, Office of Regulatory Management (ORM), and the Governor's Office
Fast-Track	APA § 2.2-4012.1 <ul style="list-style-type: none"> Governor must concur that regulatory action is "non-controversial" 	<ul style="list-style-type: none"> Includes only one step rather than three (NOIRA, proposed, final) DPB review is limited to 40 days (10 days to certify use of fast-track and another 30 days to review)

ORM is aware that, in the past, the regulatory process would often take months or even years to complete, in large measure as a result of extensive delays in the executive review process. A major part of ORM's mission is reducing those review times, and it has already reduced the average review time in the Governor's Office from 241 days to 12 days (as of the date of this memorandum).

Agencies will, of course, need to build in time for public comment and publication in the Registrar (as is also true of guidance documents), as appropriate. But the overall process could theoretically be completed in a matter of 3–4 months in the case of a fast-track action and an even shorter period of time in the case of an emergency or exempt regulation.

Of course, in cases in which it is operating under a compressed timeframe, the agency should communicate that information to (as applicable) OAG, DPB, the relevant Secretary, and ORM as soon as possible so that they can plan accordingly.